No. 15–145

IN THE

Supreme Court of the United States

HUSKY INTERNATIONAL ELECTRONICS, INC.,

Petitioner,

v.

DANIEL LEE RITZ, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at the Georgetown University Law Center where he teaches courses on bankruptcy, secured transactions, and business reorganizations and international insolvency law. He is a former Visiting Lecturer in Law at the Yale Law School, where he began teaching in 1990, a former Adjunct Professor of Law at New York University School of Law, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, in-

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

cluding *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015); *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel,*

LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 562 U.S. 61 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law and has written, taught, and lectured extensively on the subject of the bankruptcy discharge. The purpose of this brief is to address matters that bear on the Court's determination of a vitally important bankruptcy issue: whether the "actual fraud" exception to bankruptcy discharge relief in section 523(a)(2)(A) bars from discharge a debt for which the debtor is liable *not* because he intentionally and fraudulently obtained money, property, services, or credit from a creditor, but rather because he is deemed to be liable for the debts of his business under a veil piercing theory because he engaged in a "fraudulent conveyance" under state law by making transfers from his business.

The issue is important because, if accepted, Petitioner's theory of non-dischargeability would seriously impair discharge relief under the Bankruptcy Code by improperly expanding the

discharge exception of section 523(a)(2)(A) to encompass a broad range of debts without the need for a creditor to show, as section 523(a)(2)(A) requires, that the debtor owes a debt for money, property, services, or credit "obtained" through "actual fraud." That is because Petitioner's theory is *not* that Respondent owes a debt to Petitioner for goods "obtained" by fraud (which is what section 523(a)(2)(A) addresses), but rather that Respondent should not be excused from the debt because he participated in making fraudulent conveyances that resulted in Petitioner's claim going unpaid (which is beyond the scope of section 523(a)(2)(A)).

Petitioner's theory would also improperly expand section 523(a)(2)(A) because, under applicable fraudulent transfer law, fraudulent conveyance liability does not require a showing of "actual fraud." Rather, fraudulent transfer liability may be premised merely on a showing of "actual intent" to delay, hinder, or defraud, and one may be guilty of "actual intent" to delay, hinder, or defraud merely owing to the presence of four or five so-called "badges of fraud"—for example, where the debtor is insolvent, has been threatened with a debt-collection suit, makes a gift to a relative, and then incurs additional debt by making a significant charge on a credit card. In other words, the grounds for showing "actual intent" for fraudulent transfer purposes is quite different from, and less exacting than, what is

traditionally necessary to show "actual fraud" as the term is used in section 523(a)(2)(A).

This brief explains why the Fifth Circuit was correct in finding that the debt at issue falls outside the scope of section 523(a)(2)(A). The text of the provision, its context, relevant principles of statutory construction, and its history all counsel that the "actual fraud" exception of section 523(a)(2)(A) requires that the debtor have engaged in some kind of affirmative fraudulent conduct in *obtaining* money, property, services, or credit from the creditor, and simply does not encompass Petitioner's claim in this matter. This brief offers a unique contribution by focusing on how Petitioner's overreaching theory seriously threatens the integrity of discharge relief.

STATEMENT

Petitioner Husky International Electronics, Inc. ("Husky") is a seller of electronic device components. Pet. App. 2a. From 2003 to 2007, Husky sold and delivered goods to Chrysalis Manufacturing Corp. ("Chrysalis"), a company that manufactured electronic circuit boards, pursuant to a written contract. Pet. App. 2a, 38a. Chrysalis failed to pay for the goods it purchased from Husky, resulting in an unpaid debt of $163,999.38. Pet. App. 2a.

At all relevant times, Respondent Daniel Lee Ritz, Jr. ("Ritz") was a director and partial owner

of Chrysalis and was in financial control of the company. Pet. App. 2a. Between November 2006 and May 2007, Ritz caused Chrysalis to make several transfers of assets to other entities also under his control. Pet. App. 81a-82a. Husky sued Ritz in federal district court in May 2009, claiming that Ritz was personally liable for Chrysalis's debt under Texas law. Pet. App. 39a. On December 31, 2009, Ritz filed a voluntary chapter 7 bankruptcy petition. Pet. App. 79a. Thereafter, Husky initiated an adversary proceeding in Ritz's bankruptcy case, claiming that (1) due to his actions Ritz is personally liable for Chrysalis's debt, and (2) the alleged debt is non-dischargeable in Ritz's chapter 7 bankruptcy case. Pet. App. 78a-79a. As is relevant here, Husky claims that the debt is non-dischargeable under section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), which excepts from discharge "any debt" for "money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained, [sic] by false pretenses, a false representation, or actual fraud . . . ." Pet. App. 79a.

Notably, Husky's contention is *not* that Ritz himself contracted with Husky to obtain the goods in question. Nor is it Husky's claim that Ritz fraudulently induced Husky to supply the goods by making some kind of misrepresentation. Rather, Husky's claim is that Ritz is liable for Chrysalis's debt for the goods on a combined state-law veil-piercing and fraudulent convey-

ance theory. Husky's veil piercing argument is that, under applicable Texas law, the owner of a corporation may be responsible for the corporation's debts if the owner "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the [creditor] primarily for the direct personal benefit of the . . . owner . . . ." Tex. Bus. Orgs. Code § 21.223. Husky asserts that Ritz perpetrated an "actual fraud" as section 21.223 requires by invoking section 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code § 24.005(a)(1). Section 24.005(a)(1) permits the avoidance of transfers made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Husky's theory is that Ritz committed "actual fraud" for purposes of section 21.223 because Ritz made the transfers with "actual intent" to hinder, delay, or defraud Chrysalis's creditors under section 24.005(a)(1).

Notably, however, there is a critical difference between "actual fraud" and "actual intent" to hinder, delay, or defraud. A determination of "actual intent" to hinder, delay, or defraud under section 24.005(a)(1) does not require the kind of intentional wrongdoing traditionally associated with actual fraud. Rather, courts in Texas have held that "actual intent" to hinder, delay, or defraud for fraudulent transfer purposes may be demonstrated on the basis of the presence of four or five so-called "badges of fraud," which are listed non-exhaustively in section 24.005(b). *See*

Pet. App. 44a-45a n.13, 71a-72a. These "badges of fraud" include such things as (1) the debtor was insolvent when the transfer was made, (2) the debtor made the transfer without receiving in exchange reasonably equivalent value (e.g., the debtor made a gift), (3) the debtor made the transfer to an insider (e.g., to a relative), (4) the debtor had been sued or threatened with a suit before the transfer, and (5) the debtor incurred a significant debt shortly before or after making the transfer. Tex. Bus. & Com. Code § 24.005(b). Thus, fraudulent transfer liability under section 24.005(a)(1) may attach where a debtor is insolvent, has been threatened with a debt-collection suit (as many insolvent debtors are), makes a gift to a relative (such as by giving funds to a family member to buy medicine or pay the rent), and the debtor then incurs additional debt by making a significant charge on a credit card. This is far afield from the kind of conduct traditionally associated with "actual fraud."

The bankruptcy court rejected Husky's theory, concluding first that Ritz was not liable for Chrysalis's debt under Texas veil-piercing law (section 21.223 of the Texas Business Organizations Code) and, second, that the debt was not excepted from discharge under section 523(a)(2)(A), because Ritz had not committed "actual fraud" within the meaning of either statute. Pet. App. 91a-93a. "Actual fraud," the court noted, "is defined as 'the misrepresentation of a material fact with intention to induce action or

inaction, reliance on the misrepresentation by a person who, as a result of such reliance, suffers injury.'" Pet. App. 91a (citation omitted). Finding the record to be "wholly devoid of any such representation" on the part of Ritz, the court held that fraud had not been demonstrated either for purposes of Texas veil-piercing law or section 523(a)(2)(A) of the Bankruptcy Code. Pet. App. 92a.

On appeal, the district court disagreed with the bankruptcy court's veil-piercing determination, but agreed that the debt was not excepted from discharge under section 523(a)(2)(A). Pet. App. 72a. On the veil-piercing issue, the district court concluded that, because four or five "badges of fraud" were present in the case, Ritz's transfers from Chrysalis qualified as fraudulent conveyances under the "actual intent" provision of section 24.005(a)(1). Pet. App. 71a-72a. In turn, the court concluded that, because these transfers satisfied the "actual intent" requirement of section 24.005(a)(1), they also constituted "actual fraud" for purposes of section 21.223. Thus, the corporate veil could be disregarded.

On the dischargeability issue, however, the district court found the facts to be insufficient to satisfy section 523(a)(2)(A). In reaching its conclusion, the court cited *Field v. Mans*, 516 U.S. 59, 69 (1995) for the proposition that the term "actual fraud" in section 523(a)(2)(A) should be

construed according to its established common-law meaning. Pet. App. 72a. The court concluded that "[b]ecause the common law interpretation of § 523(a)(2)(A) requires a misrepresentation and there is no evidence here that Ritz made one, Husky's claim of nondischargeability under the statute fails." Pet. App. 73a.

On further appeal, the Fifth Circuit affirmed, also determining that the "actual fraud" exception to discharge under section 523(a)(2)(A) requires that the debtor have made some kind of false representation to the creditor. Pet. App. 6a-7a. "Guided by Supreme Court and Fifth Circuit precedent," Pet. App. 7a, the court below stated that this Court's decision in *Field* "appeared to assume that a false representation is necessary to establish 'actual fraud,'" Pet. App. 10a. The Fifth Circuit declined to follow the Seventh Circuit's decision in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), which held that "actual fraud" under section 523(a)(2)(A) included not only false representations, but also extended to "conveyances through which the debtor intends to hinder the creditor." Pet. App. 7a-8a. The Fifth Circuit reasoned that the *McClellan* decision was "in tension with" *Field* and noted that "[n]o subsequent appellate court has adopted the interpretation of Section 523(a)(2)(A) endorsed by the *McClellan* majority." Pet. App. 9a.

SUMMARY OF THE ARGUMENT

The bankruptcy discharge is a fundamental element of bankruptcy law that vindicates the primary bankruptcy policy of the "fresh start"—the idea that an insolvent debtor may be released from preexisting civil liabilities so that he or she may start over, free from the burden of oppressive indebtedness. Without the bankruptcy discharge, millions of insolvent individuals would remain locked in a state of perpetual indebtedness well beyond their ability to repay. Recognizing the centrality of discharge relief in the administration of bankruptcy cases, this Court has repeatedly stressed its importance in the interpretation of the Bankruptcy Code. *See, e.g., Schwab v. Reilly*, 560 U.S. 770, 803 (2010) (noting that the bankruptcy provisions "must be construed" in light of the policy "to give the bankrupt a fresh start" (citing *Burlingham v. Crouse*, 228 U.S. 459, 473 (1915))).

Although the Code provides generous discharge relief to insolvent individuals, this relief is not without limits. Among the limitations are those set forth in section 523(a)(2)(A), which excepts from discharge "any debt" for "money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained, [sic] by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). By its plain terms, this provision most naturally applies to a situation in which a debtor has "ob-

tained" from a creditor money, property, services, or credit through the use of some kind of intentional, affirmative fraud, such as by means of an outright deceit of some kind in enticing the creditor to provide goods or a loan. In this case, however, Ritz engaged in no such affirmative misconduct in acquiring any money, property, services, or credit from Husky. In fact, Ritz did not acquire anything from Husky—Chrysalis did. Nor did Ritz induce Husky to deliver any money, property, services, or credit on the basis of any kind of deceptive statement—as the bankruptcy court determined, the record is devoid of any evidence of any such thing. Rather, what Ritz stands accused of doing is making various transfers of funds from Chrysalis to other businesses that he controlled. This, however, is not the kind of conduct to which section 523(a)(2)(A) applies.

Husky's theory is that Ritz's conveyances constitute fraudulent transfers made with "actual intent" to hinder, delay, or defraud creditors within the meaning of section 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act. Tex, Bus. & Com. Code § 24.005(a)(1). Husky contends that this designation of "actual intent" is sufficient to establish that Ritz engaged in "actual fraud," not only for purposes of making Ritz liable for Chrysalis's debt to Husky under Texas veil-piercing law, but also to render the debt excepted from discharge under section 523(a)(2)(A). Husky's theory, however, does not square with

the text, context, purpose, or history of section 523(a)(2)(A). Moreover, if Husky's theory were accepted, it would improperly expand the scope of section 523(a)(2)(A) and seriously erode bankruptcy discharge relief.

Concededly, Ritz's transfers of funds from Chrysalis to other businesses he controlled may well have left Chrysalis with insufficient means to pay its bills, but that is not what section 523(a)(2)(A) addresses. Section 523(a)(2)(A) does *not* provide that a debtor who engages in a fraudulent transfer is barred from being discharged from his unpaid debts. On the contrary, a very different provision of the Bankruptcy Code, section 727(a)(2)(A), 11 U.S.C. § 727(a)(2)(A), governs that situation in a very precise and limited way—and one that does not assist Husky in this instance. Because section 523(a)(2)(A) does not address such circumstances, Husky's theory is an improper attempt to rewrite section 523(a)(2)(A) to govern matters beyond its scope.

More important, accepting Husky's interpretation would seriously undermine discharge relief generally. Under Texas fraudulent transfer law, a debtor may be determined to be guilty of "actual intent" to hinder, delay, or defraud if four or five so-called "badges of fraud" are present. *See* Pet. App. 44a-45a n.13, 71a-72a. These badges of fraud include such things as (1) the debtor was insolvent when the transfer was

made, (2) the debtor made the transfer without receiving in exchange reasonably equivalent value (e.g., the debtor made a gift), (3) the debtor made the transfer to an insider (e.g., to a relative), (4) the debtor had been sued or threatened with a suit before the transfer, and (5) the debtor incurred a significant debt shortly before or after making the transfer. Tex. Bus. & Com. Code § 24.005(b). Thus, an insolvent mother who has been threatened with a debt-collection action by a credit card company who gives her adult child a gift of money so the child can pay his rent just after making some significant charges on her credit card may be guilty of "actual intent" to hinder, delay, or defraud in making the gift to the child. Under Husky's theory, this, in turn, would qualify as "actual fraud" rendering the mother's unpaid debts non-dischargeable under section 523(a)(2)(A) simply because, by making the gift, she participated in a "fraudulent" scheme. That cannot be a correct interpretation of section 523(a)(2)(A), yet it is the logical consequence of Husky's theory. For these reasons, as well as those argued by Respondent, the decision of the Fifth Circuit rejecting Husky's erroneous interpretation should be affirmed.

ARGUMENT

The Fifth Circuit Concluded Correctly That Husky's Claim Does Not Fall Within The Scope Of Section 523(a)(2)(A).

Because section 523(a)(2)(A) applies only to certain kinds of "debts," it is critical at the outset to pinpoint precisely the debt at issue. Here, the relevant debt that Husky is attempting to collect from Ritz is Husky's claim for $163,999.38 for goods Husky sold to Chrysalis. Husky's theory of liability is *not* that Ritz fraudulently induced Husky to part with the goods Husky sold. Rather, Husky's theory is that, because Ritz participated in making fraudulent transfers from Chrysalis, the corporate veil between Ritz and Chrysalis should be pierced and Ritz held responsible for Chrysalis's liability. More precisely, Husky contends that the veil should be pierced on grounds of "actual fraud" under section 21.223 of the Texas Business Organizations Code because Ritz made the transfers with "actual intent" to hinder, delay, or defraud within the meaning of section 24.005(a)(1) of the Texas Fraudulent Transfer Act. Husky then contends that, because Ritz committed "actual fraud" for purposes of Texas's veil-piercing provision by reason of his "actual intent" to hinder, delay, or defraud under Texas fraudulent transfer law, Ritz's debt should be non-dischargeable under the "actual fraud" provision of section 523(a)(2)(A).

The initial problem with Husky's theory is that the particular *debt* that Husky is trying to enforce against Ritz—Husky's claim for $163,999.38 for goods sold to Chrysalis—is plainly not a debt for money, property, services, or credit *obtained by* fraud, and thus does not fall at all within the scope of section 523(a)(2)(A). Notably, Husky's overall theory of liability—that Ritz engaged in fraudulent transfers—*does* fall within the general purview of another discharge provision of the Bankruptcy Code, section 727(a)(2)(A). But a comparison of the terms of sections 727(a)(2)(A) and 523(a)(2)(A) reveals that their respective requirements are different. Moreover, these differences are important because they underscore why the decision below was correct.

Whereas section 523(a)(2)(A) applies only to specific debts, section 727(a)(2)(A) operates to deny *all* discharge relief of *all* of the debtor's debts in a chapter 7 proceeding if "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of [the debtor's bankruptcy case]." 11 U.S.C. § 727(a)(2)(A). By its terms, this provision addresses directly the dischargeability of a debtor's obligations where the debtor has engaged in fraudulent conveyances. This provision does not assist Husky, however, for two reasons. First, the provision applies only to the debtor's transfer of his own property. Second, it is limited to

transfers made within one year before the filing of the debtor's bankruptcy case. Here, the transfers in question did not involve Ritz's property and were made more than a year before he filed his chapter 7 petition.

In contrast, section 523(a)(2)(A) operates more surgically to deny a discharge only with respect to a particular "*debt* for money, property, services, or [credit] to the extent *obtained*, [sic] by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A) (emphasis added). As is relevant here, this section requires three basic things: (1) a debt (2) for money, property, services, or credit (3) obtained by actual fraud. But here the debt—the unpaid $163,999.38—was not for goods obtained by actual fraud. It was for goods Husky sold to Chrysalis under their contract. The alleged "fraud" in the matter occurred separately in the form of Ritz's participation in transfers from Chrysalis to other businesses. But section 523(a)(2)(A) does not deny the dischargeability of a debtor's debts simply because the debtor participated in a fraudulent transfer—that is the office of section 727(a)(2)(A) in a manner inapplicable to this case. Section 523(a)(2)(A) only denies a discharge for specific debts for money, property, services, or credit obtained by actual fraud. Husky attempts to elide the disparate elements of the two provisions with its argument that the relevant debt at issue here is nondischargeable under section 523(a)(2)(A) because

Ritz participated in a kind of fraudulent activity to Husky's detriment. *See, e.g.*, Pet. Br. at 14-15. But that is not what section 523(a)(2)(A) covers.

Seizing on this deficiency in Husky's approach, the Fifth Circuit correctly concluded that the debt Husky is attempting to collect from Ritz does not fall within the scope of section 523(a)(2)(A) because the debt is not one for money, property, services, or credit that Ritz obtained by actual fraud. More precisely, the court reasoned that, because the concept of "actual fraud" has traditionally required some kind of misrepresentation, Husky's failure to show that Ritz procured the goods through some kind of deceptive statement is fatal to Husky's claim. The Fifth Circuit was further correct in its holding because the fact that a debtor may be guilty of "actual intent" to hinder, delay, or defraud creditors for fraudulent transfer purposes is not a sufficient substitute for "actual fraud" under section 523(a)(2)(A). The concept of "actual intent" to hinder, delay, or defraud is different from, and less exacting than, the concept of "actual fraud." Interpreting section 523(a)(2)(A) to deny the dischargeability of a debt on the basis of the "actual intent" standard under fraudulent transfer law would vastly expand the scope of section 523(a)(2)(A), dislodging section 727(a)(2)(A), and imperiling discharge relief in innumerable settings far beyond anything Congress has provided for in the language it actually used in creating

its carefully tailored statutory scheme. The decision below should be affirmed.

A. Section 523(a)(2)(A) Should Be Construed Narrowly In Accordance With Its Plainly Expressed Terms.

Discharge relief has long been a critical aspect of bankruptcy law. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (noting one of the primary purposes of bankruptcy law is to excuse an insolvent debtor "'from the weight of oppressive indebtedness, and permit him to start afresh'" (quoting *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915))). Its importance is underscored by its breadth, applying generally as it does to "'*all debts that arose before the bankruptcy.*'" *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 303 (2003) (quoting *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985)) (emphasis in original); *see also* 11 U.S.C. § 1141(d) (providing discharge of "any debt" arising before confirmation of a plan, except for those debts excepted from discharge in section 523 of the Bankruptcy Code). Discharge relief is so important that the Bankruptcy Code prevents individuals from waiving it *ex ante* at the time they incur debt, *see* 11 U.S.C. § 524(a), and likewise places substantial *ex post* restrictions on the ability of debtors to waive the discharge with respect to particular debts, *see id.* § 524(c). Such protections reflect Congress's judgment that the discharge should remain broadly available, and

any impediments to invoking the discharge are rightfully limited to those Congress has expressly prescribed.

Reflecting this value, this Court has long followed the rule that the exceptions to discharge are to be "confined to those plainly expressed," *Gleason v. Thaw*, 236 U.S. 558, 562 (1915), and has rejected efforts to expand their reach through creative interpretations inconsistent with the wording of the statutory language used. *See Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760-61 (2013) (rejecting an interpretation of 11 U.S.C. § 523(a)(4) that would have broadened the defalcation exception); *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (rejecting petitioner's broad interpretation of 11 U.S.C. § 523(a)(6) as "incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed'" (quoting *Gleason*, 236 U.S. at 562)). Indeed, the canon requiring tight construction of the discharge exceptions is by now a well-established tenet of bankruptcy jurisprudence, and was properly followed by the court below. *See* Pet. App. at 16a-17a; 4 COLLIER ON BANKRUPTCY ¶ 523.05 (16th ed. 2015) ("In determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor. Any other construction would be inconsistent with the liberal spirit

that has always pervaded the entire bankruptcy system.").

In urging this Court to adopt its expansive reading of section 523(a)(2)(A), Husky's proposed interpretation—that participation in a fraudulent conveyance scheme under the "actual intent" standard of fraudulent transfer law is sufficient to constitute "actual fraud"—effectively urges the Court to abandon its longstanding practice, and with it the values that undergird Congress's ambitions for its fresh start policy. As it has in the past in cases involving even truly egregious facts, the Court should reject that offer.

In *Kawaauhau*, for example, the Court was presented with a creditor who had won a money judgment against a doctor for negligence resulting in the amputation of the creditor's right leg below the knee. 523 U.S. at 59. The doctor carried no malpractice insurance and declared bankruptcy soon after the judgment. *Id.* at 60. The patient sought to have the judgment excepted from discharge as a "willful and malicious injury" under section 523(a)(6) of the Bankruptcy Code, but this Court properly found that that exception, by its terms, only encompassed intentional torts where the debtor intended the injury, not simply negligence cases involving serious harm. *Id.* at 61-62. The judgment debt was therefore dischargeable.

Just as this Court rejected a strained reading of the statute in *Kawaauhau*, it should reject Husky's strained reading here. To hold otherwise would mark an unprecedented departure from this Court's well-established practice of construing tightly the exceptions to discharge relief.

B. The Text and Structure Of Section 523(a)(2)(A) Show That Congress Intended "Actual Fraud" To Require A Misrepresentation.

"The starting point in discerning congressional intent is the existing statutory text[.]" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statutory provision at issue] begins where all such inquiries must begin: with the language of the statute itself."). Here, the text and structure of section 523(a)(2)(A), together with its history, demonstrate that Congress intended to limit "actual fraud" to debts resulting from the debtor's misrepresentation to the creditor.

As noted, section 523(a)(2)(A) excepts from discharge "any debt for money, property, services, or [credit] . . . obtained, [sic] by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). Congress added the

"actual fraud" term to section 523(a)(2)(A) in 1978, but the fraud exception itself dates back to earlier bankruptcy enactments. *See Field v. Mans*, 516 U.S. 59, 64-65 (1995) (discussing history of section 523(a)(2)(A)); *see also Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998). As the Fifth Circuit noted below, Congress's addition of "actual fraud" in 1978 did not substantially change the scope of the fraud exception; the pre-1978 and post-1978 versions of the exception were "substantially similar." Pet. App. 15a (citing *Cohen*, 523 U.S. at 221). Its addition made clear that the fraud targeted by the exception was actual and positive fraud.

This Court previously construed the "actual fraud" term in *Field*, where it found that the term, along with "false pretenses" and "false representation" "carry the acquired meaning of terms of art" that "imply elements that the common law has defined them to include." *Field*, 516 U.S. at 69 (noting "'where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms'") (citation omitted). In deciding the degree of reliance necessary to show "actual fraud," the Court looked to both the Restatement (Second) of Torts and Prosser's Law of Torts in effect at the time of the term's addition to the statute. *Id.* at 70. Following the lead of *Field*, the Fifth Circuit in this case looked to the

same sources to construe "actual fraud," finding that both indicated that, at common law, a false representation was a necessary prerequisite for "actual fraud." Pet. App. 11a-12a (discussing *Field*, 516 U.S. at 70; Restatement (Second) of Torts § 537 (1977); William J. Prosser, Law of Torts, § 106, p. 694 (4th ed. 1971)). As the Fifth Circuit further noted, not only did the *Field* Court assume that a false representation is necessary to establish "actual fraud," Justice Breyer's dissenting opinion affirmatively noted his support for the proposition. Pet. App. 10a; *see also Field*, 516 U.S. at 79 (Breyer, J., dissenting) ("I agree with the Court's holding that 'actual fraud' under 11 U.S.C. § 523(a)(2)(A) incorporates the common-law elements of intentional misrepresentation.").

Other authority supports the Fifth Circuit's reading of "actual fraud" as requiring a false representation at common law. When the Court considered, in *Bullock*, the meaning of "defalcation" in section 523(a)(4), it noted that "'[f]raud' typically requires a false statement or omission." *Bullock*, 133 S. Ct. at 1760 (citing W. LaFave, Criminal Law § 19.7 (5th ed. 2010)). Black's Law Dictionary is also in accord. *See* BLACK'S LAW DICTIONARY 775 (10th ed. 2014) (defining "actual fraud" as "[a] concealment or false representation through an intentional or reckless statement or conduct that injures another who relies on it in acting"). Finally, Collier's explains that to "sustain a prima facie case of [actual]

fraud, a plaintiff under section 523(a)(2) must establish that: (1) *the debtor made the representation*; (2) *at the time of the representation*, the debtor knew it to be false; (3) *the debtor made the representation* with the intent and purpose of deceiving the plaintiff; (4) the plaintiff justifiably relied *on the representation*; and (5) the plaintiff sustained a loss or damage as the proximate consequence of *the representation having been made*." 4 COLLIER ON BANKRUPTCY ¶ 523.08-[1][e] (16th ed. 2015) (emphasis added).

The Fifth Circuit's construction of "actual fraud" makes even more sense when looking at the rest of section 523(a)(2)(A). The provision requires that debt be "obtained, [sic] by . . . actual fraud." 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) therefore explicitly requires causation—Congress limited the exception to those debts *caused* by a debtor's fraud. *See Field*, 516 U.S. at 66 (noting there is no dispute that "some degree of reliance is required to satisfy the element of causation in the phrase 'obtained by'"). For a debt to be caused by the debtor's fraud, the creditor needs to have relied on some action or omission by the debtor—a false representation. But under Husky's construction of "actual fraud," the creditor's reliance need be tied to nothing of the sort because, under Husky's theory, the creditor need only show that the debtor engaged in some kind of fraudulent activity not necessarily related to the incurrence of the debt—a formulation that makes little sense. *See*

Pet. Br. at 24 (arguing that actual fraud means intentional fraud without regard for whether the fraudulent conduct involved a misrepresentation).

Likewise, the causation requirement of section 523(a)(2)(A) demonstrates why Husky's attempt to limit *Field* to its facts does not succeed. *Field* determined that the crux of section 523(a)(2)(A) is reliance. *See Field*, 516 U.S. at 66. In doing so, its holding rested on the understanding that "actual fraud" requires a misrepresentation; otherwise, without a misrepresentation, there would be no basis to determine causation.

Applicable canons of statutory construction confirm the Fifth Circuit's reading of "actual fraud." Section 523(a)(2)(A) groups "actual fraud" alongside "false pretenses" and "false representation." Under the commonplace principle *noscitur a sociis*, whereby a word is known by the company it keeps, the meaning of "actual fraud" is informed by its neighbors—both of which require some representation by the debtor to the creditor. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (noting *noscitur a sociis* prevents the Court from "'ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress'") (citation omitted); *see also United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given more precise

content by the neighboring words with which it is associated"). Similarly, the principle *ejusdem generis* counsels that, "'where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Yates*, 135 S. Ct. at 1086 (quoting *Washington State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)) (internal quotation marks omitted). Applying that principle here, the meaning of "actual fraud" is properly informed and cabined by the terms preceding it. As both false pretenses and false representation properly rest on a representation from debtor to creditor, so too should "actual fraud."

Section 523(a)(2)(A)'s larger statutory context further reinforces the notion that Congress never intended for "actual fraud" to serve as a catch-all provision, either for fraudulent activity generally or fraudulent transfer activity specifically. Section 523 contains other provisions directed specifically at particular kinds of fraudulent activity: for example, excepting from discharge debts based on materially false statements in writing respecting the debtor's or insider's financial condition, as well as debts resulting from fraud or defalcation while the debtor was acting in a fiduciary capacity, embezzlement, or larceny. 11 U.S.C. §§ 523(a)(2)(B), 523(a)(4). Moreover, as noted, an entirely separate provision of the

Bankruptcy Code denies discharge relief where a debtor has committed certain kinds of fraudulent transfers. *See* 11 U.S.C. § 727(a)(2)(A). Construing section 523(a)(2)(A) to include what section 727(a)(2)(A) already covers would effectively render the latter provision superfluous—a result to be avoided. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). In sum, consistent with the Court's reasoning in *Field*, these principles of statutory interpretation likewise reinforce the conclusion that Husky's proposed interpretation of section 523(a)(2)(A) is unsound and the decision below is correct.

C. If Accepted, Husky's Interpretation of Section 523(a)(2)(A) Would Seriously Undermine Discharge Relief.

Husky contends that its interpretation of section 523(a)(2)(A) is defensible on the ground that, in this instance, the fresh start policy is outweighed by "the interest of defrauded creditors in 'being made whole.'" Pet. Br. at 53 (quoting *Cohen*, 523 U.S. at 222). But apart from the fact that this is a judgment best reserved for Congress that Congress has not, in fact, expressed in the governing statutory text, Husky's interpretation would potentially deny discharge

relief to a vast assortment of debtors who did not actually intend to defraud anyone. That is so because of the nature of fraudulent transfer liability.

As noted, a debtor may be guilty of "actual intent" to hinder, delay, or defraud under the Texas law of fraudulent transfers (which is similar to the fraudulent transfer laws of most states) if the creditor proves the existence of four or five so-called "badges of fraud," which are listed non-exhaustively in section 24.005(b) of the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code § 24.005(b). *See* Pet. App. 44a-45a n.13, 71a-72a. These "badges of fraud" include such things as (1) the debtor was insolvent when the transfer was made, (2) the debtor made the transfer without receiving in exchange reasonably equivalent value (e.g., the debtor made a gift), (3) the debtor made the transfer to an insider (e.g., to a relative), (4) the debtor had been sued or threatened with a suit before the transfer, and (5) the debtor incurred a significant debt shortly before or after making the transfer. Tex. Bus. & Com. Code § 24.005(b). Thus, as noted previously, fraudulent transfer liability may attach where an insolvent debtor who has been threatened with a debt-collection action makes a gift to a family member and then incurs some additional debt by making a significant charge on a credit card. These considerations can be mixed and matched in all kinds of ways to encompass many situations in which the debtor did

not actually intend to defraud anyone, but nonetheless ran afoul of the strictures of the fraudulent conveyance laws. This is plainly not what Congress had in mind when it enacted section 523(a)(2)(A). Yet it is the logical extension of Husky's theory.

Take, for example, an insolvent debtor who makes a substantial payment to a hospital in order to pay for a treatment for an ill parent. If a creditor previously threatened the debtor with a debt-collection suit (such as in a letter threatening to take collection action if a debt is not paid), and the debtor makes a significant charge on the debtor's credit card shortly before or after making the payment, the debtor could be guilty of "actual intent" to hinder, delay, or defraud creditors, in which event none of the debtor's debts would be discharged under Husky's reading of section 523(a)(2)(A). This goes too far.

Ignoring the harmful effects that Husky's construction of section 523(a)(2)(A) would inflict on the current system of bankruptcy relief, certain of Husky's *amici* argue that the decision below should be overturned because it could be used to benefit debtors who intentionally defraud their creditors while purposefully avoiding any misrepresentation, thereby intentionally evading section 523(a)(2)(A). *See* Br. of Bankruptcy Law Profs. as *Amici Curiae* in Support of Petitioner at 28. These *amici* offer as an illustration a Ponzi scheme executed through multiple layers

of feeder funds whereby the ultimate perpetrator of the fraud never makes any actual representation to the hundreds or thousands of investors harmed by the fraud. *Id.* at 28-29. This hypothetical, however, is both unusual and overwrought. First, such schemes typically constitute federal crimes that entail criminal restitution obligations that are not dischargeable under section 523(a)(13). 11 U.S.C. § 523(a)(13). Second, even if any resulting civil liability might not be excepted from discharge under section 523(a)(2)(A), this does not mean that some other exception would not apply There are several potential candidates, including the exception for debts for fraud while acting in a fiduciary capacity, *id.* § 523(a)(4), if the debtor "has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information from which the debtor's financial condition or business transactions might be ascertained," *id.* § 727(a)(3), or if the debtor is unable "to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities, *id.* § 727(a)(5).

In reality, the far more pressing concern is not that perpetrators of Ponzi schemes will find shelter in the arms of the bankruptcy court, but rather that Husky's reading stretches section 523(a)(2)(A) too far and would deny discharge relief to debtors Congress intended to assist with a fresh start. Indeed, under Husky's theory, the denial of a discharge could become the rule for

many ordinary debtors rather than the exception. Husky's theory is thus unsound.

CONCLUSION

For the foregoing reasons, as well as those briefed by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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